No. 13,745

IN THE

United States Court of Appeals

For the Ninth Circuit

FONG WONE JING, FONG HUNG WING and FONG NGAR JING, by their Guardian Ad Litem, William Y. Fong,

Appellants,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLANTS.

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JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the Court below by Section 503 of the Nationality Act of 1940 (8 U. S. C. sec. 903, 54 Stat. 1171), which provides in pertinent part, as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, many institute an action against

> the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States."[1]

Jurisdiction to review the judgment of the Court below is conferred upon this Court by 28 U. S. C. Section 1291.

The claim of right as citizens, and the denial of that right by the American Consulate General at Hong Kong, an official executive of the Department of State, of which appellee is the head, are pleaded in the complaint. (T. 3-7.)

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[1]This statute has been repealed by the Immigration and Nationality Act of 1952 (8 U. S. C. sec. 1101, et seq.) which became effective December 24, 1952, but Section 405 (a) of the latter Act continues the former statute in force and effect as to suits which were pending when the new Act became effective. (66 Stat. 280.)

STATEMENT OF THE CASE.

Appellants, Fong Wone Jing, female, age 19 years, Fong Hung Wing, male, age 17 years, and Fong Ngar Jing, female, age 15 years, claim to be citizens of the United States on the ground that their father, Fong Lim Fong, was a citizen of the United States at the times of their respective births in China. The claim of the oldest appellant arises under Section 1993 of the Revised Statutes,[2] as originally enacted, and the claims of the two younger appellants arise under the same section as amended by the Act of May 24, 1934. (48 Stat. 797.)[3]

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[2] "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

[3] "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the right of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

The requirement that such children must reside in the United States for at least five years immediately previous to attaining the age of 18 years was retrospectively changed by the 1940 Act to provide that such residence must be between the ages of thirteen and twenty-one years (8 U. S. C. 601 (g)(h)), and was again retrospectively changed by the 1952 Act to require that the child must come to the United States before attaining the age of twenty-three years and must be continuously physically present in the United States for five years between the ages of fourteen and twenty-eight years. (8 U. S. C. 1401 (b)(c).)

Following denial by the American Consulate General at Hong Kong of appellants' application to that Consulate for travel documents to permit them to proceed to the United States this suit was brought in the Court below. Appellants were then permitted to come forward to the United States as provided in Section 503 of the Nationality Act of 1940, supra, for the sole purpose of prosecuting this suit.

At the trial below it was stipulated that Fong Lim Fong (appellants' alleged father) came to the United States on November 5, 1929, that he was admitted into the United States as a citizen and that he was issued a Certificate of Identity by the immigration authorities. (T. 10.) He was subsequently in China from 1931 to 1933, and last departed from the United States for China on January 16, 1934. (T. 13.) He never returned to the United States thereafter (T. 13) and the testimony is that he died in China when the appellants were young children. (T. 62.) One of his children, Fong Hung Fong (also known as Fong Din Deck) was admitted into the United States as a citizen in 1949 and was subsequently issued a Certificate of Citizenship attesting to that status (T. 39) in accordance with Section 339 of the Nationality Act of 1940. (8 U. S. C. sec. 739.)

At the trial in the Court below the three appellants testified as witnesses, as did the older brother (who, as mentioned above, was admitted into the United States in 1949 as a citizen), their paternal grandmother, their father's brother (who is their guardian) and their

father's sister, who was born in the United States. The appellee offered no evidence.

The Court below made the following findings of fact:

> "1. It is not true that the permanent residence and domicile of the persons who claim to be the plaintiffs Fong Wone Jing, Fong Hung Wing, and Fong Ngar Jing is within the Northern District of California, or in the United States of America.
>
> 2. The persons who claim to be plaintiffs Fong Wone Jing, Fong Hung Wing, and Fong Ngar Jing have failed to introduce evidence of sufficient clarity to satisfy or convince the Court that Fong Lim Fong is the natural blood father of persons known as Fong Wone Jing, Fong Hung Wing, and Fong Ngar Jing, or that the persons who, appeared before this Court claiming to be plaintiffs Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing are in truth and fact Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing." (T. 13-14.)

The question involved is whether these findings are "clearly erroneous". (Rule 52 (a), Federal Rules of Civil Procedure.)

SPECIFICATION OF ERRORS.

Appellants have specified the following as the points on which they intend to rely on this appeal:

> "1. That the findings of the District Court are clearly erroneous.

2. That the findings, conclusions and judgment of the District Court are unsupported by the evidence of record.

3. That the findings, conclusion and judgment of the District Court are contrary to the evidence of record.

4. That the District Court erred in finding that the plaintiffs-appellants did not have a claim to permanent residence within the Northern District of California or in the United States of America.

5. That the District Court erred in concluding that the plaintiffs-appellants, Fong Wone Jing, Fong Hung Wing and Fong Ngar Jing, and each of them, are not United States citizens".

(T. 114-115.)

ARGUMENT.

1. STATEMENT OF THE EVIDENCE.

It was stipulated at the trial that Fong Lim Fong (alleged father of the appellants) was admitted to the United States as a citizen on November 5, 1929 and was issued a Certificate of Identity by the Immigration authorities, that according to immigration records he was subsequently in China from 1931 to 1933, and that he last departed from the United States on January 16, 1934. (T. 25, 28.)

Yee Song Mee, the mother of Fong Lim Fong, testified at the trial in the Court below that she came to the United States in 1915 (T. 27), and that her husband (who died in 1928) was born in the United States.

(T. 38.) She testified that Fong Lim Fong was her son (T. 25), that after he came to the United States he made a trip to China to get married (T. 27), that his wife was Jee Shee and that she had seen Jee Shee. (T. 27.) This witness was in China on a visit to the family's home village, the Gong Mee Village in the Toyshan District, in 1935 (T. 28-29), from which trip she returned in September, 1936. (T. 24.) She testified that when she arrived in China on that occasion her son, Fong Lim Fong, was residing in the Gong Mee Village with his wife, Jee Shee, that they were residing together as husband and wife (T. 29), that Fong Lim Fong introduced Jee Shee to her as his wife (T. 29), that they had a son and a daughter residing there with them when the witness arrived, that another son was born to them while witness was there (T. 29), and that the second daughter was born to them after witness returned to the United States, but that Fong Lim Fong had written her regarding the birth of that child. (T. 35.) This witness identified a photograph (Plaintiffs' Exhibit No. 5) as having been taken in 1936 in the Gong Mee Village a short time before she returned to the United States, testifying further (T. 33-34) that in the picture she is carrying her grandchild, Fong Hung Wing (the male appellant), and that the child standing in front of her in the photograph is her grandchild, Fong Hung Fong (appellants' older brother, who was admitted to the United States as a citizen in 1949). She also identified the persons shown in a later photograph (Plaintiffs' Ex. No. 3) as her daughter-in-law, Jee Shee, and her four grand-

children, viz., the three appellants and their older brother, Fong Hung Fong. (T. 27-28.)

This older brother, Fong Hung Fong (also known as Fong Din Deck) testified that he came to this country in 1949 (T. 52), that the appellants are his brother and sisters, that before he came to the United States he lived with them in the Gong Mee Village, that Jee Shee is his mother and the appellants' mother, that Fong Lim Fong is his father and the appellants' father, that their mother, Jee Shee, always lived with them in China, that he last saw his father, Fong Lim Fong, about 1938 and that he remembers his father. (T. 53-54, 56.) He identified a photograph of his father (T. 56) and identified the persons in the group photograph (Plaintiffs' Exhibit No. 3) consisting of his mother, the three appellants and himself. (T. 58.)

Each of the three appellants testified that they were all born in the Gong Mee Village, that until they came to the United States in April, 1952 they always resided together in that village with their mother, Jee Shee, that Fong Lim Fong was their father, and that their oldest brother, Fong Hung Fong (Fong Din Deck), lived with them until he came to the United States in 1949. (T. 59-62, 66-69, 70-72.) Each identified the photograph of the adult female in Plaintiffs' Exhibit No. 3 as that of their mother, Jee Shee. (T. 53-64, 69, 72-73.)

Ruby Fong Yee, the sister of appellants' father, also testified. She was born in the United States on Octo-

ber 5, 1916 (T. 74) and accompanied her mother (appellants' grandmother) to China on the trip in 1935-1936. (T. 74-75.) During the eleven months they were in China at that time they lived with Fong Lim Fong and his wife, Jee Shee, in the Gong Mee Village. (T. 75.) At that time Fong Lim Fong and Jee Shee had two children, Fong Hung Fong (appellants' older brother) and Fong Wone Jing (the eldest appellant). (T. 75.) Their second boy, Fong Hung Wing, was born while the witness was there, and the second girl, Fong Ngar Jing, was born after the witness returned to the United States. (T. 76.) This witness testified (T. 78) that she personally took the picture (Plaintiffs' Exhibit No. 3) which was taken in the Gong Mee Village in 1936. That is the photograph in which witness Yee Song Mee pointed out her grandchildren, Fong Hung Wing and Fong Hung Fong. Witness Ruby Fong Yee also identified photographs of Fong Lim Fong (T. 74) and of his wife, Jee Shee, and their four children. (T. 78.)

William Y. Fong, brother of Fong Lim Fong, also testified. He was last in China in 1929 (T. 44) and had therefore never seen the children of Fong Lim Fong until they came to the United States (T. 49) but he produced a number of checks dated in 1940 covering remittances which he testified he sent to China for the support of Fong Lim Fong's wife and children. (T. 45-46.)

The foregoing was the testimony offered in this case. It was entirely uncontradicted and unimpeached. The appellee offered no evidence.

To summarize briefly: six witnesses gave testimony on the direct fact of the claimed relationship. Four of these were the children who had always lived together in the home of Fong Lim Fong and Jee Shee and who testified that the latter were their father and mother. The oldest of these was admitted into the United States in 1949 as the citizen son of Fong Lim Fong. That child holds a Certificate of Citizenship based on that relationship, which was issued to him under Sec. 339 of the Nationality Act of 1940. (8 U. S. C. Sec. 739.) The paternal grandmother and a paternal aunt of these four children, who had spent about eleven months at their home in China in 1935-1936, testified directly as to their knowledge that three of these children (one of whom was born during their visit there) were members of the family and household of Fong Lim Fong and his wife, Jee Shee. They produced a photograph taken at that time by the aunt which shows the grandmother with two of the children, who were then very young. The Government made no attempt to dispute the testimony that Fong Hung Fong and appellant Fong Hung Wing are the children shown with the grandmother in that photograph.

It is difficult to perceive how a stronger showing could have been made that these appellants are the children of Fong Lim Fong and his wife, Jee Shee. It is true that testimony of the parents was unobtainable, the father being deceased and the mother being in Communist China. It is understood, however, that the mother, Jee Shee, did accompany the appellants to the American Consulate General at Hong Kong

when they made their application for travel documents, but whatever testimony was taken from her at that time is not available, since the Consulate's file pertaining to the case cannot be located by the Government. (T. 20, 83.)

The Court below in giving judgment against appellants filed no opinion but set forth in its memorandum order for judgment (T. 11-12) that the evidence presented by appellants did not conform to the standards enunciated in the opinion filed the same day in the case of *Ly Shew v. Acheson,* 110 F. S. 50.

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2. THE FINDINGS OF FACT ARE "CLEARLY ERRONEOUS," ARE UNSUPPORTED BY THE EVIDENCE AND ARE CONTRARY TO THE EVIDENCE.

While this is one of the first cases of its type to come before this Court by way of an appeal from a judgment in an action under 8 U. S. C. sec. 903, supra, this Court has long dealt with the same situation in previous cases which have come before it both in habeas corpus proceedings, wherein an administrative decision is under collateral attack, and in appeals in deportation cases after a judicial trial on the merits under certain sections of the Chinese Exclusion Acts. We submit that the principles frequently laid down by this Court in those types of cases are pertinent here, for reasons which we shall hereinafter discuss.

The extent of this Court's appellate review of the findings of fact of the trial Court is prescribed by

Rule 52 (a) of the Federal Rules of Civil Procedure. In construing that Rule the Supreme Court has said:

> "It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies, or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."
>
> *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364, 394-395, 68 S. Ct. 525, 541-542, 92 L. Ed. 746.

> "A finding of fact is clearly erroneous if it is against the clear weight of the evidence."
>
> *Fleming v. Palmer* (C.A. 1) 123 F. (2d) 749, 751 (cert. den. 316 U. S. 662, 65 S. Ct. 942, 86 L. Ed. 1739).

Accord:

> *St. Louis Union Trust Co. v. Finnegan* (C.A. 8) 197 F. (2d) 565, 568.

Or if it is against the positive, uncontradicted and unimpeached testimony.

Foran et al. v. Comm. of Internal Revenue (C.A. 5) 165 F. (2d) 705, 707.

"Both under Rule 52 (a) of the Rules of Civil Procedure, and well established equitable principles, we are not bound by the trial court's findings if we are of the view that they are against the great weight of the evidence."

Gutowsky v. Jones et al. (C.A. 10) 178 F. (2d) 60, 65.

Unimpeached and uncontradicted testimony cannot be disregarded.

Chesapeake and Ohio Ry. Co. v. Martin, 283 U. S. 209, 216-217, 51 S. Ct. 453, 75 L. Ed. 983, 987-988;

Grace Bros. v. Commissioner of Int. Revenue (C.A. 9) 173 F. (2d) 170, 174;

San Francisco Assn. for the Blind v. Industrial Aid for the Blind, Inc. (C.A. 8) 152 F. (2d) 532, 536.

In *Foran et al. v. Commissioner of Internal Revenue* (C.A. 8), supra, wherein the only evidence before the trial Court was the testimony of one of the parties the appellate court said:

"We think the court's refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury."

Moreover, as stated by the Court of Appeals for the Second Circuit in

Orvis v. Higgins, 180 F. (2d) 537, 540 (cert. denied 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595).

> "It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding."

We submit that in the case at bar the findings are "clearly erroneous" within the meaning of Rule 52 (a), supra, in that they are against the clear weight of the evidence, which is all one way and which is positive, uncontradicted and unimpeached. We submit, further, that under principles laid down by this Court in many cases, a finding against appellants on this record would not withstand appellate review even if made by an administrative tribunal whose decisions are declared to be final by statute. (8 U. S. C. sec. 153.)

In

Go Lun v. Nagle, 22 F. (2d) 246, 248,

with regard to such a review this Court said:

> "We fully appreciate the narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review decisions of the immigration tribunals; but 'the error of an administrative tribunal may, of course, be so flagrant as to convince a court that the hearing had was not a fair one'. *Tisi v. Tod,* 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590. Such a case is presented here.

> A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony.
>
> In *Johnson v. Damon* (CCA) 16 F. (2d) 65, the court considered discrepancies on which an excluding decision was based, more important than any disclosed by the present record and in reference to the excluding decision said 'The mind revolts against such methods of dealing with vital human rights.' That language might well be applied here."

The case of *Johnson v. Damon,* from which this Court quoted the forceful language just mentioned, involved two Chinese boys who sought entry as sons of a citizen who had died when they were infants. Their testimony was supported by that of a previously admitted brother and an uncle. The evidence, therefore, was basically similar to that in the case at bar but somewhat weaker. Despite the statutory limitations upon the power of the Court to review the administrative decision, the Court in that case was impelled to overturn that decision in the forceful language quoted by this Court in the *Go Lun* case, supra.

In speaking of the rejection by administrative tribunals of uncontradicted and unimpeached testimony by the appellant and his alleged relatives in

Gung You v. Nagle, 34 F. (2d) 848, 852, this Court said:

> "The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses, either because of a fixed policy, to *give a weight to a presumption of law far beyond the legislative intent,* or because of a policy calculated to entrap the witness * * *." (Italics added.)

In that case, the Court went on to say:

> "Relationship is not usually proved by physical facts, and never is where the mother does not testify, but by pedigree reputation in the family, and by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligations involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parents and child is evidence to the contrary.
>
> Such evidence is not collateral evidence; it is direct and material evidence on the issue."

In conclusion, this Court held that the rejection of the evidence of the several witnesses was purely arbitrary.

See also:

Quan Toon Jung v. Bonham (C.A. 9) 119 F. (2d) 915;

Wong Tsick Wye et al. v. Nagle (C.A. 9) 33 F. (2d) 226.

In

Chun Kwock Quan v. Proctor, 92 F. (2d) 326,

this Court has extensively reviewed the well established principles applicable to judicial review of *administrative* findings in Chinese citizenship cases. In that case the Court points out that such findings must have some factual support in the record, that suspicion may not take the place of actual evidence, that evidence may not be disregarded because of a belief that frauds may have been committed by other Chinese in other cases, and that it is the province of the Courts, in proceedings for review of decisions of the immigration officials, to prevent abuse of the statutory power wielded by them.

It seems obvious that an administrative finding of fact adverse to the appellants would not withstand even the limited review afforded on habeas corpus proceedings, under the foregoing decisions and many others to the same effect. Moreover, it is plain under the authorities hereinbefore cited that the power of appellate review of findings of fact under Rule 52 (a) of the Federal Rules of Civil Procedure is even *broader* than it is in the case of administrative findings which carry statutory finality. Consequently, we submit that the findings of the Court below are "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

Furthermore, this Court, in considering appeals from judgments entered in judicial deportation proceedings under former Sec. 282 of Title 8 U. S. C., has held that uncontradicted and unimpeached testi-

mony of witnesses in behalf of the defendant cannot be disregarded by the trial Court.

Wong Kam Chong v. U. S. (C.A. 9) 111 F. (2d) 707, 712;

Lee Hin v. United States (C.A. 9) 74 F. (2d) 172.

This Court has further held that in such proceedings the evidence must be weighed in the light of the defendant's ability to produce evidence (*Lee Hin v. United States,* supra), that such evidence cannot be rejected because the witnesses are Chinese (*Yee Chung v. United States* (C.A. 9) 243 F. 126, 130; *Lau Hu Yuen v. United States* (C.A. 9) 85 F. (2d) 327, 330) and that the requirement of former Sec. 284, supra, that citizenship of a Chinese person must be proved "to the satisfaction of" the Judge or Commissioner "means nothing more than that the proofs must be sufficient to satisfy reasonable judicial standards". (*Ching Hong Yuk v. United States* (C.A. 9) 23 F. (2d) 174, 175.)

We submit that the foregoing principles enunciated by this Court in reviewing administrative decisions and judgments in judicial deportation proceedings are applicable here by analogy. The scope of the appellate review under Rule 52 (a) of the Federal Rules of Civil Procedure is *at least* as broad as in habeas corpus or judicial deportation proceedings. Here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The four children, the aunt and the grandmother gave testimony directly upon the issue. They

produced a photograph taken by the aunt more than sixteen years ago which shows two of the children with the grandmother. The testimony of the uncle regarding his remittances for the support of his brother's wife and children in China is to that extent corroborative of the direct testimony given by the other six witnesses. No contradictory or countervailing evidence has been submitted. We submit that under the well-settled principles mentioned above the findings of the Court below adverse to the claim of appellants are "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

In its memorandum decision the Court below made reference to standards set forth in its opinion filed the same day in the case of *Ly Shew v. Acheson,* supra. Brief discussion of that opinion is therefore pertinent.

Preliminarily it appears from the *Ly Shew* opinion that the Court below was considerably dismayed by the fact that some seven hundred suits of this type are pending. But the real significance of the pendency of so large a number of suits under section 503 of the Nationality Act of 1940 (8 U. S. C. sec. 903) should not be overlooked. That situation is the direct result of the adoption by the State Department within the last three years of a policy which prevents Chinese persons seeking admission to the United States as the children of citizens from proceeding to a port of entry in the United States (as they had theretofore done) and submitting their evidence to the statutory tri-

bunals created by the immigration laws to determine the right of persons to enter the United States.

Throughout the years until about 1950 the State Department permitted such applicants to set forth their citizenship claim by affidavit, which affidavit was then endorsed by the Consulate as valid for the purpose of traveling to a port of the United States to have the claim determined by the immigration tribunals under 8 U. S. C. secs. 152, 153. Those sections of the immigration laws provided for hearings before boards of special inquiry in all doubtful cases, with a complete record of the proceedings and of all testimony produced, and a statutory appeal to the Attorney General by the applicant or any dissenting member of such board.[4] By regulation effective December 11, 1946 the right to counsel in such proceedings was provided. (8 C. F. R. 130.2—1946 Suppl.) Adverse decisions of the immigration authorities were reviewable by habeas corpus, and after the effective date of 8 U. S. C. sec. 903, supra, by a suit thereunder where a claim of citizenship had been denied. Under that procedure most of the cases of this type were disposed of administratively and did not reach the Courts.

Commencing something less than three years ago the Consulate General at Hong Kong began refusing travel documentation to large numbers of these applicants on the ground that their evidence of citizenship was "not satisfactory", and for the past year and a half relatively few of these citizen applicants have

[4]Similar procedures are provided in the new Immigration and Nationality Act of 1952. (8 U. S. C. secs. 1225, 1226.)

been permitted to come forward. The purported authority for this new procedure is the Passport Act of May 22, 1918, as amended June 21, 1941 (22 U. S. C. secs. 223-226), which provides in pertinent part as follows:

Sec. 223:

"*When the United States is at war or during the existence of the national emergency* proclaimed by the President on May 27, 1941, or as to aliens wherever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by sections 223-226b of this title be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful * * *" (Italics added.)

Sec. 224:

"After such proclamation as is provided for by section 223 of this title has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport."

On November 14, 1941 the President issued Proclamation No. 2523 (55 Stat. 1696), which provided that

no citizen should enter the United States without a valid passport unless he came within such exceptions as might be prescribed by the Secretary of State. Until about 1950, as indicated above, the State Department in practice permitted Chinese persons seeking entry as children of citizens to proceed to the United States on a visaed affidavit and have their claim determined by the immigration authorities at the port of entry.

Under the new policy inaugurated some two years ago the consular authorities at Hong Kong have undertaken to make final disposition of these citizenship claims. Where they refuse to issue any sort of travel documentation the applicant is effectively prevented from proceeding to a port of entry in the United States, since transportation lines will not accept an undocumented passenger for fear of possible penal proceedings under 22 U. S. C. sec. 225. The result is that applicants of this class are faced with final administrative rejection of their claim of citizenship on the basis of an interview with a consular officer, without benefit of counsel, where the putative father and other relatives are ordinarily unable to appear for personal testimony since they are usually residing in the United States. Normally the only reason given the applicant for rejection of his claim is that the consular officer is "not satisfied." This Court has cited a similar executive tendency to give short shrift to citizenship claims as "one of the reasons why there is current in America the phrase 'a Chinaman's chance'." (*Yuen Boo Ming v. United States,* 103 F. (2d) 355, 358.)

In this situation it is certainly not at all surprising that some seven hundred of these rejected applicants have invoked the jurisdiction of the Courts under 8 U. S. C. sec. 903, supra.

As stated by this Court in

Wong Wing Foo v. McGrath, 196 F. (2d) 120, 122:

> "The right to citizenship is a priceless thing and Congress in enacting Section 903 in 1940 well could have decided that citizenship should not be denied one possessing it, by an administrative proceeding such as 8 U. S. C.A. sec. 153, first enacted in 1917, in which the right to any counsel is denied and where hearsay evidence which may be determinative is admissible (citing cases) and in which the finding as to citizenship is deemed final (citing cases)."

Certainly the summary rejection of such citizenship claims by a consular officer without formal proceedings of any kind would inevitably force such applicants into Court under sec. 903, supra. They have no other recourse unless they are to relinquish their birthright at the mere fiat of some consular employee.

Obviously, under the circumstances the fact that their case is but one of some seven hundred should not weigh against these appellants. Moreover, it is no more reasonable to assume that these are seven hundred fraudulent cases than it is to assume that they are cases in which there has been arbitrary rejection by the consulate of bona fide citizenship claims. The situation is not of appellants' choosing.

They were perfectly willing to submit their evidence and witnesses to the scrutiny of the immigration tribunals at a formal hearing had they been permitted to do so.

In this connection we would make one further observation. The travel restrictions for citizens under which this new consular procedure has been adopted apply only during war or national emergency.[5] At no other time is there statutory authority to impose a mandatory requirement that a citizen obtain a travel document before seeking to enter the United States. In House Report No. 2041 on the Joint Resolution to continue the effective period of these and other emergency provisions the Committee on the Judiciary of the House of Representatives said relative to these travel restrictions that the measure would be necessary "in order to control the entry and departure of *subversive* individuals, whether aliens or citizens, and other persons whose movements, *in the interests of national security* should be restricted". (U. S. Code Cong. and Adm. News, 82nd Congress, 2nd Session, Vol. 2 at page 1936.) To use these emergency security controls for the summary rejection of claims of citizenship at a consulate abroad on other than security grounds is indeed a peremptory method of dealing with the priceless right of citizenship. Again we say it is not surprising that the rejected claimants seek redress from the Courts under sec. 903, supra.

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[5]The comparable provisions of the new Immigration Act of 1952 contain a similar limitation. (8 U. S. C. sec. 1185.)

It is true that the new Immigration and Nationality Act of 1952 provides for this type of suit only where the claimant is in the United States (8 U. S. C. sec. 1503). However, that Act specifically provides in section 405 thereof that suits filed before it became effective shall not be affected (66 Stat. 280).

Nor is the application of sec. 903, supra, limited to case involving alleged expatriation; it is available to any person claiming citizenship who has been refused permission to come to the United States by a consular officer. (*Acheson v. Yee King Gee* (CA 9) 184 F. (2d) 382; *Wong Wing Foo v. McGrath,* supra.)

Certain statistical data relative to Chinese citizenship cases generally are set forth in the opinion in the *Ly Shew* case. Since the record is silent as to the methods used in arriving at the figures cited we have no way of determining their accuracy. However, the asserted proponderance of male offspring over female offspring in the claims of citizen Chinese clearly does not apply here, since this family has two sons and two daughters. Likewise, the fact that more male than female children may actually apply to come to the United States is not present in the case at bar. Nor does there appear to be anything surprising in the fact that many American citizens of Chinese extraction have married in China and have had children born there of such marriages. Let us examine this situation with respect to the case at bar. *It was never possible for Fong Lim Fong to bring his wife, Jee*

Shee, to the United States. The Immigration Act of 1924 (8 U. S. C. sec. 213) originally made Chinese wives of citizens inadmissible. (*Chang Chan v. Nagle,* 268 U. S. 346, 45 S. Ct. 540, 69 L. Ed. 988.) That prohibition was modified on June 13, 1930, but only as to those who had married citizens before May 26, 1924. (46 Stat. 581.) Other Chinese wives of citizens were not accorded nonquota classification until August 9, 1946 (60 Stat. 975), and this amendment came too late to benefit Jee Shee, since her husband was then deceased. Theoretically, a Chinese person could come to the United States after the repeal of the Chinese Exclusion Acts on December 17, 1943 (57 Stat. 600), *if reached under the annual quota of 105,* but the chances of being so reached were obviously remote because of the oversubscribed condition of the quota. For example, as of August 1, 1952 (we have no earlier figures) the Chinese quota had a waiting list of 2,495. (Report of President's Commission on Immigration and Naturalization pursuant to Executive Order No. 10392, at page 104.)

We think the foregoing factual observations demonstrate the danger of attempting to apply sweeping generalizations to individual cases. Moreover, we venture to observe that history is studded with the attempts of the executive branches of governments to justify disregard of the rights of individuals on the ground that it is necessary to do so in order to prevent abuses. To strike a balance between the demands of administrative expediency and the vital rights of

individuals is the *raison d'etre* of such judicial remedies as are provided by sec. 903, supra, and herein, we think, lies the explanation of the large number of such suits which have been filed within the past two years. The volume of that litigation, we submit, should not operate to the detriment of these appellants.

The opinion in the *Ly Shew* case contains certain observations regarding the custom of United States citizens of Chinese race marrying in China, begetting children there and not bringing such children to the United States in many instances until they are in their teens. The statute, however, permits citizenship to descend and to be retained under such circumstances. The wisdom of the legislation is, of course, solely for Congress to determine. Section 1993 of the Revised Statutes was originally enacted in 1866. During the intervening eighty-seven years Congress has seen fit to make changes in the statute (to operate prospectively) only to the extent of requiring that children born after 1934 must come to the United States before they attain the age of 16 years (48 Stat. 797; 54 Stat. 1139, sec. 201 (g) and (h)), now changed to 23 years (8 U. S. C. sec. 1401 (b) (c)), and that citizenship would descend after the effective date of the Nationality Act of 1940 only if the citizen parent had a prescribed period of residence in the United States. (54 Stat. 1139.)

The basic statute, with the amendments mentioned above, has been in operation for nearly a century and

certainly during that time Congress has been cognizant of the fact that citizens of Chinese race were begetting and raising citizen children in China. Yet Congress throughout that time has seen fit to preserve the citizenship of such children, having simply enacted certain prospective limitations to which we have just alluded. Moreover, while Congress has now prospectively limited suits for judgments declaring citizenship to persons who are within the United States, Congress was careful to preserve the former statute (8 U. S. C. sec. 903) as to suits which were pending when the 1952 statute went into effect.

We are not disposed to question where the burden of proof lies in these cases, nor whether it shifts at any stage of the proof. We do contend most earnestly that where, as here, there is positive, uncontradicted and unimpeached testimony of six persons as to the existence of the asserted relationship, a decision adverse to the claimants cannot be supported. We submit that this view is sustained by the numerous cases cited above in which this Court, in one type of proceeding or another, has considered questions closely analogous to those presented here. We submit further that those decisions are authority for the propositions that such evidence may not be rejected because the witnesses are Chinese, nor because of mere suspicion or conjecture, nor because of a belief that frauds have been practiced by other individuals, nor because of considerations which fall within the realm of legislative policy, nor because of a policy "to give weight to a

presumption of law far beyond the legislative intent". Judged by these settled principles, we submit that the findings of the Court below in this case are "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

The Court below erred in concluding that appellants did not have a claim of permanent residence in the Northern District of California.

With regard to the first finding of fact we would point out additionally that the allegation in the complaint (T. 5) that appellants claim permanent residence within the Northern District of California constituted sufficient basis for invoking the jurisdiction of the Court under 8 U. S. C. sec. 903, supra. (*Acheson v. Yee King Gee,* supra.) This particular finding does not go to the merits of the case, and since the statute permits the claimant to sue in the "District of Columbia *or in the district in which such person claims a permanent residence* (italics added)" obviously it was intended to permit the claimant to choose the forum. Apparently the first finding of the Court below is merely ancillary to the further finding that appellants had failed to prove that they are the children of Fong Lim Fong, and the latter finding, we submit, cannot stand for the reasons heretofore discussed.

The Court below erred in concluding that appellants are not citizens of the United States.

For the reasons and under the authorities hereinbefore discussed we submit that the Court below erred

in holding that appellants had failed to establish their United States citizenship.

The positive, uncontradicted and unimpeached testimony given by the four children was supported by that of the grandmother, an aunt and an uncle, was further corroborated by the fact that the immigration records over a period of many years show not only the geneology and citizenship of the putative father, but also show that the grandmother and aunt made the trip to China in 1935-1936 and further show that the brother was admitted as a citizen son of the father in 1949, all of this being buttressed by a photograph taken by one of the witnesses in China seventeen years ago showing the brother and one of the appellants with the grandmother.

If this positive, uncontradicted and unimpeached evidence be insufficient to establish citizenship under Sec. 1993 of the Revised Statutes it is difficult to see how any Chinese child of a United States citizen could establish his citizenship. We submit that the rejection of that evidence in this case was clearly erroneous under the authorities we have cited. Moreover, suspicion is insufficient to support such a finding of fact.

Wong Gook Chun v. Proctor, (C.A. 9) 84 F. (2d) 763, 765;

Tillinghast v. Wong Wing (C.A. 1), 33 F. (2d) 290.

As a matter of fact, certain remarks of the trial Court tend to indicate that the Court did not dis-

believe the witnesses in this case (T. 85, 101-102) but felt that to give judgment for appellants would amount to making American citizens, just as is done under the naturalization process. (T. 102.)

We do not think that a judgment declaring citizenship under sec. 903, supra, is discretionary to the same extent as a decree granting citizenship in a naturalization proceeding. If these appellants are children of Fong Lim Fong, then they are citizens of the United States under a statute which made them citizens at birth. The power and duty of the Court under sec. 903, supra, are simply to declare such citizenship if it exists. This, therefore, is a fact issue to be litigated under principles and standards applicable generally to civil causes in the Federal Courts. Under those principles and standards we submit that the findings of the trial Court in this case cannot be sustained. A finding cannot rest upon mere speculation, conjecture, surmise, guess or suspicion.

Penn. R. Co. v. Chamberlain, 288 U. S. 333, 344, 53 S. Ct. 391, 395, 77 L. Ed. 819, 825;

Controller of California v. Lockwood (C.A. 9) 193 F. (2d) 169, 172;

United States v. Sandifer (C.A. 5) 76 F. (2d) 551;

Doggett v. Peek et al. (C.A. 5) 116 F. (2d) 273, 274.

Certainly the positive, uncontradicted and unimpeached evidence produced by appellants was sufficient to establish the existence of the relationship asserted

under "reasonable judicial standards". (*Ching Hong Yuk v. United States,* supra.)

CONCLUSION.

We submit that the findings of the Court below are "clearly erroneous," and that the judgment should be reversed.

Dated, San Francisco, California,
May 27, 1953.

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